United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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74-1190

To be argued by
GARY A. WOODFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1190

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UNITED STATES OF AMERICA,

Appellee,

—*against*—

IP KEI WAI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

EDWARD JOHN BOYD, V,
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Preliminary Statement

This is an appeal from a judgment of conviction, entered in the Eastern District of New York, after a jury trial (Coffrin, *J.*), convicting appellant Ip Kei Wai of importing and possessing heroin with intent to distribute.

Appellant, along with co-defendants Ho Cheung Sing and Seng Kar Wong (hereinafter Ho and Wong respectively), was charged in a three count indictment with violations of Federal narcotics laws. Count one alleged that on or about July 31, 1973, the defendants did import into the United States approximately four pounds of heroin in violation of Title 21, United States Code, § 952(a) and Title 18, United States Code, § 2. Count two charged that on or about August 3, 1973, the defendants did possess four pounds of heroin with the intent to distribute, in violation of 21, United States Code, § 841(a) and 18, United States Code, § 2. And Count three alleged that between July 1, 1973 and August 3, 1973,

the defendants did conspire to import and possess a quantity of heroin in violation of 21, United States Code, § 846. After a jury trial before Judge Coffrin, appellant and co-defendant Wong were found guilty of all three counts; co-defendant Ho was found guilty of count three alone. On January 24, 1974, Ho and Wong were sentenced to terms of three years imprisonment, and appellant was sentenced to a term of six years imprisonment. Appellant is free on bail pending this appeal.

On appeal, appellant contends (1) that the Government's evidence failed to demonstrate any knowledge on his part that the package he and his co-defendants picked up at Kennedy Airport on August 3, 1973, contained heroin; (2) that he was prejudiced by an inadequate and misleading jury charge regarding the element of knowledge; and (3) that the warrantless Customs search of the package was without probable cause and in violation of the Fourth Amendment.

Statement of Facts

On or about August 2, 1973, Special Agent Matthew Maher of the Drug Enforcement Administration (DEA) received information from an informant that a package arriving at John F. Kennedy International Airport aboard a Japan Airlines flight from Hong Kong and addressed to "G.A.T. Trading Co., C/O C. S. Ho, 60 East Broadway, Apt. 3B, N.Y.C., N.Y. 10001" was believed to contain heroin. Agent Maher relayed this information to DEA Agent Logan at the airport, who conducted a preliminary investigation revealing that such a package did exist and informed United States Customs Inspector Guistra of the facts (93, 109).

Acting pursuant to his authority under 19, U.S.C., § 482, Guistra opened and inspected the package, which was found to contain seventeen individually boxed plastic desk sets and twelve paper weights. Guistra then drilled a hole in

the base of one of the plastic desk sets, exposing a brown rock-like substance contained therein (183, 184). A sample of the secreted substance was removed for analysis, which subsequently confirmed it to be heroin. Later that afternoon, custody of the package was given to DEA agents who took it to their office at the airport and removed the heroin from all but four of the desk sets. Approximately four pounds of heroin was discovered. The heroin was replaced with a powder-like substance and the package, with a small amount of heroin remaining, was resealed and returned to Customs for pick-up at Japan Airlines (274, 275).

Meanwhile, at approximately 2:45 P.M. on August 2, 1973, appellant's Buick was observed and recorded by security guards at John F. Kennedy International Airport entering the Japan Airlines cargo terminal area (Ex. 4, 194, 196, 197). That afternoon Wong entered the terminal and requested the package addressed to G.A.T. Trading Co. He was informed by a Japan Airlines employee that the package could not be located and was told to return the next day for delivery (237).

The following day, appellant's automobile reappeared at the Japan Airlines cargo terminal area. Shortly thereafter, Wong again entered the terminal and requested the package addressed to G.A.T. Wong presented the requisite documents and awaited delivery (238, 245). Peter O'Brien, a DEA agent acting in an undercover capacity as a Japan Airlines employee, came forward and requested identification from Wong. After Wong had signed the appropriate document, the package was given to him and he exited the building, proceeding directly to appellant's car (304, 305). Appellant then got out of the car and aided Wong in placing the package in the trunk (307). A third individual was observed in the car by surveillance agents (308, 309).

As appellant's automobile exited the airport, it was followed by Agents Smith and Caraviotis in an undercover vehicle. This surveillance was lost, however, when a stalled

truck blocked traffic at the airport exit. Tracing the license plate of appellant's automobile, appellant's address at 142 Gurnsey Street, Brooklyn was obtained (318). Agents Smith and Caraviotis then drove directly to that address and, as they arrived, they observed appellant's automobile proceed along Gurnsey Street, pull over, and park. The appellant, Ho and Wong then got out of the car and appellant personally removed the package from the trunk. All three proceeded up the block to 142 Gurnsey Street and ascended the steps towards the appellant's apartment (319, 320). After the three defendants entered the vestibule of the building, and as they were about to enter an inner door, Agent Smith ascended the stairs, announced that he was a federal agent, and placed the appellant, Ho and Wong under arrest. At the moment of arrest appellant, who was still in possession of the package, dropped it and attempted to flee through the partially opened second door. He was caught by Agent Smith (321, 322).

Further evidence at the trial showed that the GAT Trading Co., did not, in fact, exist at the 60 East Broadway address (285), but rather that that was the address of the defendant Ho (509). Chemical analysis of the rock-like substance found within the desk sets and paper weights revealed it to be approximately four pounds of heroin (507).

None of the defendants took the witness stand, nor did they offer any evidence to contradict the Government's proof.

At a pre-trial suppression hearing, the defendants challenged the customs search and the fruits thereof. Specifically, appellant argued *inter alia,* that the Customs inspector lacked the required reasonable cause for suspicion under 19, U.S.C., § 482 (6, 32-40).

In response to this motion, the Government called Customs Inspector Guistra to testify as to the facts surrounding his opening of the package addressed to GAT. Inspector

Guistra stated that, after he had a conversation with Agent Logan of the Drug Enforcement Administration, he and another Customs Inspector, accompanied by Agent Logan, proceeded to Japan Airlines, located the package, opened and inspected it. The Court found that the Customs Inspector had the requisite suspicion to search (41).

Upon appellant's motion to reconsider, the Court reopened the suppression hearing and allowed the Government to call Special Agent Keith Logan to testify. Agent Logan testified that he had received information from a fellow agent, Matthew Maher, that an informant claimed a certain package addressed to G.A.T. Trading Co., c/o C. S. Ho, 60 East Broadway, New York City, N.Y., and consigned to Overseas Cargo Terminals in Jamaica, might contain heroin (93, 109). After an investigation revealed that such a package existed, Agent Logan gave this information to Customs Inspectors Rich and Guistra who in turn conducted a border search (40, 116). The District Court then denied appellant's motion, finding that Customs Inspector Guistra had reasonable cause for suspicion (166).

ARGUMENT

POINT I

The evidence at trial sufficiently established appellant's guilty knowledge.

The appellant initially contends that the Government failed to present sufficient evidence from which a jury could infer that he knew there was heroin secreted in the package. More specifically, citing *United States* v. *Moler*, 460 F.2d 1273 (9th Cir. 1972); *United States* v. *Hou Wan Lee*, 264 F. Supp. 804 (S.D.N.Y. 1967), and *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973), appellant alleges that the mere

reception and possession of a package containing drugs has been held to be an insufficient predicate for a finding of the requisite guilty knowledge. This position is neither supported by the above-cited cases, nor is it consistent with the well-established presumption of knowledge arising from mere possession. See e.g., *United States* v. *Joly,* — F.2d — (2d Cir. slip op. 775, decided March 12, 1974).

United States v. *Hou Wan Lee, supra,* is wholly inapposite. At issue there was not the presumption of knowledge which might have arisen from the defendant's possession of contraband secreted in a shipment of furniture which he received, but rather, the very admissibility of the contraband from which the presumption would issue. In granting the defendant's motion to suppress the evidence seized by Customs agents at defendant's store after he received a shipment known by the agents to contain contraband jade, Judge Mansfield merely held that the Customs agents were without authority to arrest the defendant, and that, absent a valid arrest, the evidence seized in the warrantless search conducted at the time of arrest had to be suppressed. Moreover, under the controlling statute in *Lee,* 18, U.S.C., § 545, the court held that, vis-a-vis contraband, "there is no presumption that possession is unlawful unless . . . knowledge is established" 264 F. Supp. at 826. Here, on the other hand, we are dealing with possession of an illicit narcotic, which permits an inference of knowledge. *United States* v. *Joly, supra.*

United States v. *Moler* is similarly distinguishable. There, the defendants received in the mail a package addressed to another. The Court found no competent evidence which tended to prove that the defendants knew the contents of the package which was addressed to someone else.

Unlike the defendants in *Moler,* the appellant herein was not the passive recipient of a package addressed to another. Appellant and his co-defendants went out to Ken-

nedy Airport on two successive days to retrieve a package addressed to an apparently non-existent company in care of defendant Ho. Upon Wong's receipt of the package, the appellant took charge of it, placing it in the trunk of his car and later personally carrying it to *his* apartment rather than Ho's. While the jury was free to conclude that the appellant was the unintentional recipient of four pounds of heroin—valued at more than $60,000 wholesale—it also had before it sufficient evidence to support the presumption, and thus the inference, that the appellant was well aware of what he possessed. Additionally, appellant's guilty conduct at the time of his arrest—when he dropped the package and attempted to escape—is sufficient to distinguish the instant case from *Moler*.

In *United States* v. *Infanti, supra,* where the defendants Infanti and Kurtz had been convicted for transportation in foreign commerce of four stock certificates, knowing the certificates to have been stolen, the Court affirmed the conviction of Infanti, but reversed as to co-defendant Kurtz (474 F.2d at 527). In finding the evidence sufficient as to Infanti, the Court stated, "[f]rom Infanti's possession of the stolen certificates without a reasonable explanation the jury was entitled to *infer* that he knew the certificates were stolen" (Id. at 525). However, the Court found that Kurtz had neither actual nor constructive possession of the stolen securities, thus no inferences could be drawn (Id. at 526). In finding no other evidence to establish that Kurtz knew the securities were stolen, the Court held that the evidence was not sufficient to establish Kurtz's guilty knowledge (Id. at 527).

Appellant would have the Court analogize his situation to that of the co-defendant Kurtz. As noted above, Kurtz was found to have had neither actual nor constructive possession of the stolen instruments. Appellant, on the other hand, unquestionably had actual possession of the illicit heroin at the time of his arrest; he is thus in a position analogous to

Infanti not Kurtz. Thus from his possession of the heroin, "without a reasonable explanation", the jury was entitled to infer that he knew he possessed the drug. *United States* v. *Infanti,* 474 F.2d at 525.

In sum, appellant Ip was arrested in possession of four pounds of heroin. As this Court recently noted in *United States* v. *Joly, supra,* from the defendant's possession "a legitimate inference arises that he knows what he possesses." While "other evidence may weaken the inference . . . the legitimacy of the basic inference of knowledge does not automatically disappear because other evidence arguably points the opposite way" (Id. at 2060). Here, the inference was buttressed by the appellant's guilty conduct at the time of his arrest. It cannot be said, therefore, that there was insufficient evidence from which the jury could infer the requisite guilty knowledge.

POINT II

The District Court properly instructed the jury.

Appellant contends that the trial court's instruction on the element of knowledge was misleading and inadequate. Specifically, appellant urges that the court's definition of "knowingly and intentionally" mislead the jurors to believe their burden was to determine only whether appellant knew that it was illegal to import heroin, rather than whether appellant knew that the package contained heroin.

In his charge to the jury, Judge Coffrin charged that the jury must determine whether "the defendant knew that it was unlawful to import heroin into the United States, and with such knowledge *intentionally imported the heroin* into the United States" (659, 660) (emphasis added).

As to whether appellant acted knowingly and intentionally—with the requisite criminal knowledge—the court further charged:

> The second element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly and intentionally. An act is done knowingly if it is done voluntarily and intentionally, and not because of mistake or accident or some other innocent reason. As act is done intentionally if it is done knowingly, voluntarily, wilfully, and with a specific intent to do something which the law forbids. That is with a purpose to either disobey or disregard the law (660, 661).

This instruction as to the issue of knowledge is clear and an accurate statement of the law. *United States* v. *Curtis,* 430 F.2d 1159, 1161 (6th Cir. 1970), *cert. denied,* 401 U.S. 915, *rehearing denied,* 401 U.S. 1004 (1971), 1 Devitt and Blackmar, *Federal Jury Practice and Instructions,* 2d Edition, Section 16.07, at p. 308.

Appellant further contends that the trial court committed reversible error when it denied appellant's request to charge on the following points: (1) that if the evidence gives rise to inferences as consistent with innocence as with guilt, the the jury must acquit; (2) that appellant's failure to con al his activities or identity is sufficient evidence to raise a reasonable doubt, and (3) appellant's mere presence at the scene of the crime is not sufficient evidence of appellant's guilt.

In reading the charge in its entirety, it is clear that the Court adequately instructed the jury concerning the points requested by the appellant. The Court informed the jurors that they were permitted to draw reasonable inferences from the facts as they found them (656) and that they should

weigh the actions of the defendants in reaching their conclusions:

> The acts of a person must be set in their time and place. The meaning and significance of a particular act or conduct may and usually does depend upon the circumstances surrounding the act or conduct. You should consider the acts and conduct of each defendant and whether such facts, if you believe them, make it likely or unlikely, probable or improbable, that the defendant fully and precisely understood what he was doing (661).

This Court has specifically held that a refusal to instruct on "two inferences", that is, that evidence giving rise to inferences as consistent with innocence as with guilt requires acquittal (Appellant's Appendix p. 16a), is proper. *United States* v. *Warren,* 453 F.2d 738, 745 (2d Cir.), *cert. denied,* 406 U.S. 944 (1972).

Lastly, appellant claims prejudicial error was committed by the trial court's failure to instruct appellant's "mere presence" charge. Clearly a "mere presence" charge would have been clearly inappropriate under these facts. Compare *United States* v. *Kearse,* 444 F.2d 62 (2d Cir. 1971). Here appellant was in actual possession of the heroin at the time of his arrest; and his attempted escape at the time of arrest evidenced participation and not mere presence at the scene. Moreover, the Court did charge the jury that more than mere association was required:

> The defendant's mere association with those who committed the crime or knowledge that the crime was to be committed are [sic] not sufficient to establish this offense.
>
> You the jury must be convinced beyond a reasonable doubt that the defendant was a participant or a substantial assistant in the commission of the crime, rather than merely a knowledgeable spectator.
>
> . . . . .

> Still, differently stated, an aider and abettor must have the same knowledge and intent required as a principal. . . . In order to find any of the defendants guilty of aiding and abetting you must find that the defendants acted wilfully and knowingly . . . (663-65).

This general charge has recently been approved by this Court. *United States* v. *Wisniewski*, 478 F.2d 274 (2d Cir. 1973); See also, *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962); *United States* v. *Martinez*, 479 F.2d 824, 829 (1st Cir. 1973).

The District Court's charge was in all respects proper.

POINT III

The airport search revealing the heroin was a valid Customs search.

Appellant finally argues that the airport search revealing the presence of heroin in the package was essentially a DEA search rather than a Customs search, thus requiring full satisfaction of the Fourth Amendment's probable cause standard.

The Government submits that the Customs search performed on this package was performed and completed pursuant to 19, U.S.C., § 482. Subsequent activities involving this package and the arrest of the appellant and his co-defendants are irrelevant on the issue of the search's validity. See, e.g. *United States* v. *Gonzalez*, 483 F.2d 223 (2d Cir. 1973).

The law regarding customs searches is clear. The government has a well-recognized right to conduct customs searches of persons and merchandise as they enter the country. See *Carroll* v. *United States*, 267 U.S. 132, 149-154

(1925); *Boyd* v. *United States,* 116 U.S. 616, 623 (1886). Border searches fall within a category distinct from other searches and seizures, neither requiring a search warrant nor probable cause to establish their legality. See *Walker* v. *United States,* 404 F.2d 900 (5th Cir., 1968); *United States* v. *Glaziou,* [redacted]; *Morales* v. *United States,* 378 F.2d 814 (5th Cir. 1967). Title 19, U.S.C., § 482, provides, in part, that customs officials may search any trunk or envelope wherever found, when the official has "reasonable cause to suspect there is merchandise which was imported contrary to law". And cases have construed this § 482 "reasonable cause" standard to include searches based upon suspicion alone, or even on a random basis. *United States* v. *Stornini,* 443 F.2d 833 (1st Cir.), *cert. denied,* 404 U.S. 861 (1971); *Landau* v. *United States Attorney,* 82 F.2d 285 (2d Cir.), *cert. denied,* 298 U.S. 665 (1936). Indeed, mere unsupported suspicion alone is sufficient to justify a border search. See *Alexander* v. *United States,* 362 F.2d 379 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966).

Here, there is no question that 19, U.S.C., § 482 applies, and that the search was conducted pursuant to that authority. The package searched by Customs Inspector Guistra arrived at New York from Hong Kong (Ex. 5). Guistra searched the package after being told by DEA Agent Logan that DEA had received information from an informant that a particular package might contain heroin, and this was supported by the fact that the package described by the informant existed (92, 93). Obviously, Agent Logan's limited involvement in relaying the information to Inspector Guistra did not diminish the authority of Customs to conduct a border search.

Appellant's reliance upon *Corngold* v. *United States,* 367 F.2d 1 (9th Cir. 1966), is misplaced. In *Corngold,* a package delivered to Los Angeles International Airport for shipment to New York was opened by a Trans World Airline employee upon the request and with the assistance of Cus-

toms Agents (Id. at 4). The Court, in holding such a search to be a Government search subject to the Fourth Amendment, distinguished that search from one authorized by 19, U.S.C., § 482 (Id. at 3). The authority granted in 19, U.S.C., § 482 was found to relate only to the search and seizure of illegally *imported* merchandise. In *Corngold,* however, there was "nothing in the record to suggest that the search of appellant's packages occurred in the course of an entry into this country" (Id. at 3).

Based on the facts and the law, it is submitted that the search performed by the customs inspectors was authorized by statute and was therefore valid.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: Brooklyn, New York
April 18, 1974

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
GARY A. WOODFIELD,
Assistant United States Attorneys,
Of Counsel.

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____ is hereby admitted.

Dated: _____, 19____

_____

Attorney for _____

FPI-LC-SM-8-73-7355

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(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN JOHNSON, being duly sworn, says that on the 19th day of April, 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Irwin Rochman, Esq.
230 Park Avenue
New York, New York 10017

Carolyn N. Johnson
CAROLYN N. JOHNSON

Sworn to before me this
19th day of April, 1974

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1975